A

Tan Sri Dato' Lim Guan Teik v Tan Kai Hee

B

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S-23–123 OF 2007
LAU BEE LAN J
13 JULY 2013

C

Tort — Defamation — Damages — Exemplary damages — Whether defendant gained advantage by making defamatory statements — Whether proof of actual damage required — Presumption of damage due to invasion of reputation

D

Tort — Defamation — Defences — Fair comment — Comments and facts to be particularised — Whether failure to comply with O 78 r 3(2) of the Rules of the High Court 1980

E

Tort — Defamation — Defences — Qualified privilege — Reciprocity of interest between maker and recipient — Reciprocity of interest between company director and shareholders to reveal information regarding possible misappropriation of funds by other directors — Whether press an effective medium for director to communicate with shareholders — Whether defence of qualified privilege defeated by proof of malice

F

Tort — Defamation — Libel — Publication of defamatory article in local newspaper — Allegations of misappropriation of funds — Whether words or statements in articles defamatory — Whether words or statements complained of referred to plaintiff — Whether words or statements published — Whether defence of qualified privilege applied — Whether defence of fair comment applied

G

The plaintiff was the chairman of Unico Holdings Bhd Board of Directors ('UHB's BOD') from 28 January 1999 – 6 August 2008. At the same time, the plaintiff was also the President of Associated Chinese Chambers of Commerce and Industry of Malaysia ('ACCCIM') from 6 October 1998 to 23 August 2003. The late Tan Sri Ngan was the managing director of UHB from 1995 until 2004 and later was appointed UHB's company advisor on 30 May 2007. The defendant was a director of UHB since 1990 until he was not re-elected during UHB's AGM held on 28 September 2007. UHB's BOD was presented with a proposal for reduction of UHB's capital ('the scheme'). The defendant, who was a director of UHB, objected to the scheme. The plaintiff was then the chairman of UHB's BOD. UHB's BOD resolved to seek a mandate from the shareholders of UHB ('shareholders' mandate') in the forthcoming AGM (to

H

I

be held on 28 September 2007) whether to proceed with the scheme. The defendant was against the idea of obtaining shareholders' mandate as he did not agree with the scheme. To garner opposition to the scheme and the proposed resolution for the shareholders' mandate, the defendant publicly declared that he would set up 'The Pro Tern Committee to Defend the Rights and Interests of Unico Holdings Minority Shareholders'. On 25 September 2007, the defendant called for a press conference where he made certain statements concerning a payment of RM2m. On 26 September 2007 an article appeared in *Nanyang* where it was reported that the defendant had during the press conference said that when the plaintiff was the chairman of UHB, he had issued a cheque for the sum of RM2,000,000 in favour of then the President of ACCCIM, requesting ACCCIM to refrain from interfering with business activities of UHB ('first impugned statement'). Another article appeared in *Sin Chew* where it was reported that the defendant had during the press conference said that UHB Chairman, Ngan Ching Wen had paid one lump sum 'reward' of RM2,000,000 to ACCCIM, requesting ACCCIM not to interfere in the affairs of UHB and that the then President of ACCCIM was the plaintiff ('second impugned statement'). On 27 September 2007, an emergency UHB's BOD meeting was called whereby the defendant was informed of the impugned statements. The defendant claimed that he had not released any incorrect information intentionally but nevertheless he would investigate the matter. The defendant however failed to reply to the plaintiff's solicitor's letter demanding a retraction of the impugned statements and an apology from the defendant. Hence, the plaintiff filed this action seeking damages for defamation.

Held:

(1) The defendant made the impugned statements and had caused the publication of the impugned publications. The natural and probable result of the defendant's act as a prominent corporate figure would be what he said at the press conference on 25 September 2007 would be republished in the media and the defendant must be responsible for the republication of the impugned statements in the impugned publications (see para 24).

(2) The impugned statements were defamatory of the plaintiff as they were 'calculated to expose the plaintiff to hatred, ridicule or contempt in the mind of the reasonable man or would tend to lower the plaintiff in the estimation of right thinking members of society generally. The impugned statements also contained innuendo which was defamatory of the plaintiff (see paras 34 & 37).

(3) The crux of the defence of qualified privilege lies in the reciprocity of interest between the maker (the defendant) and the recipient (the public at large, including the minority shareholders of UHB). The defendant

had a 'duty, legal, social or moral' to inform the shareholders of matters which he honestly believed affected the shareholders who were facing an impending AGM three days later. They were entitled to expect their directors to make full disclosure of all matters that are relevant to them to allow them to make an informed decision. The shareholders had a 'sufficient interest' to receive the information that the defendant is communicating to them. The defence of qualified privilege was available to the defendant. The defendant had invited the press as it was an effective medium for him to communicate to the shareholders (see paras 44–45).

(4) The defendant must particularise which were the words in the impugned statements of the plaintiff were comments and which were facts. The defendant had failed to show what were the words in the impugned statements that were comment and those that were facts. The defence of fair comment was wholly unsustainable because the defendant had failed to comply with O 78 r 3(2) of the Rules of the High Court 1980 (see para 51).

(5) The defence of qualified privilege may be defeated by the plaintiff proving that the defendant was actuated by malice. The plaintiff had established that when the defendant made the impugned statements he was actuated by malice (see para 54).

(6) In determining the award of damages in an action for defamation, the claimant need not allege that actual damage has resulted from the words complained of as the law presumes some damage will flow in the ordinary course of things from the mere invasion of his absolute right to reputation and he is entitled to general damages as the court may properly award (see para 72).

(7) No exemplary damages were awarded as the defendant did not gain some advantage in making the impugned statements (see para 74).

[Bahasa Malaysia summary

Plaintif adalah Pengerusi Lembaga Pengarah Unico Holdings Bhd ('UHB's BOD') dari 28 Januari 1999 – 6 Ogos 2008. Pada masa yang sama, plaintif juga merupakan Presiden Associated Chinese Chambers of Commerce and Industry of Malaysia ('ACCCIM') dari 6 Oktober 1998 hingga 23 Ogos 2003. Mendiang Tan Sri Ngan adalah pengarah urusan UHB dari 1995 hingga 2004 dan kemudiannya dilantik menjadi penasihat syarikat UHB pada 30 Mei 2007. Defendan adalah pengarah UHB sejak 1990 sehinggalah dia tidak dilantik semula semasa AGM UHB yang diadakan pada 28 September 2007. Lembaga Pengarah UHB dikemukakan dengan cadangan bagi pengurangan capital UHB ('skim tersebut'). Defendan, sebagai pengarah UHB, membantah cadangan tersebut. Plaintif kemudiannya menjadi Pengerusi Lembaga Pengarah UHB. Lembaga Pengarah UHB bertekad mendapatkan mandat

daripada pemegang-pemegang syer UHB ('mandat pemegang-pemegang syer') dalam AGM akan datang (yang akan diadakan pada 28 September 2007) sama ada untuk meneruskan skim tersebut. Defendan menentang idea untuk mendapatkan mandat pemegang-pemegang syer kerana tidak bersetuju dengan skim tersebut. Untuk mendapatkan tentangan terhadap skim dan resolusi yang dicadangkan bagi mandat pemegang-pemegang syer, defendan mengisytiharkan secara terbuka bahawa dia akan membentuk 'The Pro Tern Committee to Defend the Rights and Interests of Unico Holdings Minority Shareholders'. Pada 25 September 2007, defendan mengadakan satu sidang akhbar yang mana dia membuat beberapa kenyataan mengenai bayaran RM2 juta. Pada 26 September 2007, satu artikel diterbitkan di dalam *Nanyang* yang mana ia melaporkan bahawa defendan telah, semasa sidang akhbar, mengatakan bahawa semasa plaintif adalah Pengerusi UHB, beliau telah mengeluarkan cek berjumlah RM2 juta bagi Presiden ACCCIM, meminta ACCCIM untuk tidak campur tangan dalam aktiviti perniagaan UHB ('kenyataan pertama yang dipertikaikan'). Satu lagi artikel diterbitkan di dalam *Sin Chew* di mana dilaporkan bahawa defendan telah semasa sidang akhbar mengatakan bahawa Pengerusi UHB, Ngan Chin Wen telah membayar satu jumlah 'ganjaran' sekali gus sebanyak RM2 juta kepada ACCCIM, meminta ACCCIM untuk tidak campur tangan dalam hal ehwal UHB dan bahawa Presiden ACCCIM ketika itu adalah plaintif ('kenyataan yang dipertikaikan kedua'). Pada 27 September 2007, satu mesyuarat lembaga pengarah tergempar telah diadakan di mana defendan telah dimaklumkan mengenai kenyataan-kenyataan yang dipertikaikan tersebut. Defendan menyatakan bahawa dia tidak mengeluarkan sebarang maklumat salah dengan sengaja namun akan menyiasat perkara tersebut. Defendan walau bagaimanapun gagal untuk membalas surat peguam plaintif memohon penarikan semula kenyataan-kenyataan yang dipertikaikan dan satu permohonan maaf daripada defendan. Oleh itu, plaintif, memfailkan tindakan ini memohon ganti rugi bagi fitnah.

Diputuskan:

(1) Defendan telah membuat kenyataan-kenyataan yang dipertikaikan tersebut dan telah menyebabkan penerbitan ke atas penerbitan-penerbitan yang dipertikaikan. Akibat semulajadi dan berkemungkinan daripada tindakan defendan sebagai tokoh figura korporat adalah apa yang dinyatakannya dalam sidang akhbar pada 25 September 2007 akan dicetak semula dalam media dan defendan mestilah bertanggungjawab bagi cetakan semula kenyataan-kenyataan yang dipertikaikan tersebut (lihat perenggan 24).

(2) Kenyataan-kenyataan yang dipertikaikan adalah memfitnah plaintif kerana kesemuanya dibentuk untuk mendedahkan plaintif kepada kebencian, tohmahan atau penghinaan dalam minda seorang lelaki munasabah atau akan merendahkan plaintif dalam jangkaan ahli-ahli

masyarakat yang waras amnya. Kenyataan-kenyataan yang dipertikaikan tersebut juga mengandungi sindiran yang bersifat memfitnah kepada plaintif (lihat perenggan 34 & 37).

(3) Intipati pembelaan hak istimewa terletak pada kesalingan kepentingan antara pembuat (defendan) dan penerima (masyarakat awam, termasuk pemegang-pemegang saham UHB). Defendan mempunyai kewajipan undang-undang, sosial atau moral untuk memaklumkan pemegang-pemegang syer mengenai perkara-perkara yang beliau secara jujurnya percaya memberi kesan kepada pemegang-pemegang syer yang berhadapan dengan AGM yang berlangsung tiga hari kemudian. Mereka berhak untuk menjangkakan agar pengarah-pengarah membuat pendedahan sepenuhnya kepada mereka untuk membenarkan mereka membuat keputusan yang dimaklumkan. Pemegang-pemegang syer mempunyai 'kepentingan yang mencukupi' untuk menerima maklumat bahawa defendan berkomunikasi dengan mereka. Pembelaan hak istimewa tersedia untuk defendan. Defendan telah mengundang akhbar kerana ia adalah media yang efektif untuknya menyampaikannya kepada pemegang-pemegang syer (lihat perenggan 44–45).

(4) Defendan-defendan mestilah menyatakan perkataan yang mana dalam kenyataan-kenyataan plaintif yang dipertikaikan adalah komen dan yang mana adalah fakta. Defendan telah gagal menunjukkan apakah perkataan-perkataan dalam kenyataan-kenyataan yang dipertikaikan yang merupakan komen dan yang mana merupakan fakta. Pembelaan komen yang adil keseluruhannya tidak mampan kerana defendan gagal mematuhi A 78 k 3(2) Kaedah-Kaedah Mahkamah Tinggi 1980 (lihat perenggan 51).

(5) Pembelaan hak istimewa boleh dikalahkan oleh plaintif dengan membuktikan bahawa defendan bermotifkan niat jahat. Plaintif telah membuktikan bahawa ketika defendan membuat kenyataan-kenyataan yang dipertikaikan tersebut, beliau bermotifkan niat jahat (lihat perenggan 54).

(6) Dalam memutuskan award ganti rugi dalam tindakan fitnah, pihak yang menuntut tidak perlu menyatakan bahawa kerugian telah berlaku akibat perkataan-perkataan yang diadukan kerana undang-undang menganggap beberapa kerugian akan terhasil daripada perjalanan biasa dari pencerobohan hak mutlaknya ke atas reputasi dan dia berhak ke atas ganti rugi am kerana mahkamah boleh mengawardkan dengan betul (lihat perenggan 72).

(7) Tiada ganti rugi teladan yang diawardkan kerana defendan tidak mendapat sebarang faedah dalam membuat kenyataan-kenyataan yang dipertikaikan tersebut (lihat perenggan 74).]

Notes

For cases on damages, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 377–404.

For cases on defences, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 425–449.

For cases on libel, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 523–723.

Cases referred to

AJA Peter v OG Nio & Ors [1980] 1 MLJ 226 (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)

Bre Sdn Bhd & Ors v Tun Datuk Patinggi Hj Abdul Rahman Ya'kub [2005] 3 MLJ 485, CA (refd)

Chan Yoke Lain (administrator of the estate of Chong Yoke Fan, deceased) v Pacific & Orient Insurance Co Sdn Bhd [1999] 1 MLJ 303, CA (refd)

Chok Foo Choo @ Chok Kee Lian v The China Press Bhd [1999] 1 MLJ 371, CA (refd)

Dato' Dr Tan Chee Khuan v Chin Choong Seng @ Victor Chin [2011] 8 MLJ 608; [2011] 8 CLJ 574, HC (refd)

Datuk Seri Utama Dr Rais bin Yatim v Amizudin bin Ahmat [2012] 2 MLJ 807, HC (refd)

English and Scottish Co-operative Properties Mortgage and Investment Society Ltd v Odhams Press Limited [1940] 1 KB 440, CA (refd)

Gan Yook Chin dan satu lagi lwn Lee Ing Chin @ Lee Teck Seng dan lain-lain [2001] 2 MLJ 70, HC (refd)

Grappelli v Derek Block (Holdings) Ltd [1981] 1 WLR 822, CA (refd)

Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd [1991] 1 MLJ 33, SC (refd)

Horrocks v Lowe [1975] AC 135, HL (refd)

Jameel v Wall Street Journal Europe SPRL [2006] UKHL 44, HL (refd)

Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd [1999] 4 MLJ 637, CA (not folld)

Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 3 MLJ 627, CA (refd)

Lee Ah Chor v Southern Bank Bhd [1991] 1 MLJ 428, SC (refd)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (refd)

Mount Cook Group Ltd v Johnstone Motors Ltd [1990] 2 NZLR 488, HC (refd)

R Murugason v The Straits Times Press (1975) Ltd [1984] 2 MLJ 10 (refd)

Reynolds v Times Newspapers Ltd [2001] 2 AC 127, HL (not folld)

Seaga v Harper [2008] 1 All ER 965, PC (refd)

Sims v Wran [1984] 1 NSWLR 317 (refd)

Sivabalan a/l P Asapathy v The New Straits Times Press (M) Bhd [2010] 9 MLJ 320, HC (refd)
Tan Cheng Hock v Chan Thean Soo & Anor [1987] 2 MLJ 479 (refd)
Tan Sri Dato' Tan Kok Ping, JP Iwn The New Straits Times Press (M) Bhd dan lain-lain dan satu lagi guaman [2010] 2 MLJ 694, HC (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)
Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v Bre Sdn Bhd & Ors [1996] 1 MLJ 393, HC (refd)
Unico Holdings Berhad v Lee Sack Choon & Ors [2009] MLJU 1483, HC (refd)
Wallersteiner v Moir, Moir v Wallersteiner [1974] 3 All ER 217, CA (not folld)
Wiedemann v Walpole [1891] 2 QB 534, CA (refd)
Wong Hon Leong David v Noorazman bin Adnan [1995] 3 MLJ 283, CA (refd)

Legislation referred to

Civil Law Act 1956 s 8
Evidence Act 1950 ss 8(2), 114(g)
Rules of Court 2012 O 59 rr 8(b), 16(1)
Rules of the High Court 1980 O 78 r 3(2)

Wong Kian Kheong (Alex Tan Chie Sian with him) (Wong Kian Kheong) for the plaintiff.
Ravindran Shanmuganathan (Sreenevasan Young) for the defendant.

Lau Bee Lan J:

[1] This libel action was originally commenced by Tan Sri Dato' Lim Guan Teik ('Tan Sri Lim') and the late Tan Sri Ngan Ching Wen ('Tan Sri Ngan') as the first and the second plaintiffs against the defendant, Mr Tan Kai Hee ('the defendant') on 20 November 2007. However Tan Sri Lim now proceeds with this action as the sole plaintiff as the late Tan Sri Ngan's cause of action against the defendant for tort of defamation abated pursuant to proviso to s 8 of the Civil Law Act 1956 when Tan Sri Ngan passed away on 1 March 2011.

[2] For the background facts which are generally undisputed I shall adopt what has been summarised in the plaintiff's submission:

(a) the plaintiff was the chairman of UHB's BOD ('Unico Holdings Bhd Board of Directors') from 28 January 1999 — 6 August 2008 (WSPW1, Q&A 2(c)(iii) at p 3). At the same time, the plaintiff was also the president of ACCCIM ('Associated Chinese Chambers of Commerce and Industry of Malaysia' from 6 October 1998 to 23 August 2003 (WSPW1, Q&A 3(b)(ii) at p 5);

(b) the late Tan Sri Ngan was the managing director of UHB from 1995 until 2004 (WSDW1, Q&A 17(i) at p 9). Subsequently, the late Tan Sri Ngan

was appointed by UHB's BOD as UHB's company advisor on 30 May 2007 (bundle D3, at pp 86 and 92);

(c) the defendant was a director of UHB since 1990 (WSDW1, Q&A 6 at p 4) until he was not re-elected during UHB's AGM held on 28 September 2007 (bundle D5 at pp 1, 7 and 9);

(d) On 21 December 2006, UHB's BOD was presented with a proposal which in summary is as follows:

(i) 97% of UHB's investment in Unico-Desa Plantations Bhd ('UDPB') (namely 240m UDPB shares) would be distributed to UHB's shareholders on the basis of 2.4 UDPB shares for every one share held in UHB by way of capital reduction;

(ii) balance 3% (equivalent to 7.52 million UDPB shares) would be dealt with at the discretion of UHB's BOD; and

(iii) after the distribution, par value of UHB's shares would be reduced from RM1 to RM0.10 per share. As a consequence thereof, UHB's issued and paid up capital would be reduced from RM100,000,000 to RM10,000,000 comprising of 100,000,000 ordinary shares of RM0.10 each.

('proposed return of capital and capital reduction OScheme') (bundle D3 at pp 70–77).

(e) The defendant, who was a director of UHB, objected to the proposed return of capital and capital reduction scheme (bundle D3, at pp 78 and 80–81). At the material time, the plaintiff was the chairman of UHB's BOD.

(f) On 31 July 2007, UHB's BOD resolved to seek a mandate from the shareholders of UHB ('shareholders' mandate') in the forthcoming AGM (to be held on 28 September 2007) whether to proceed with the proposed return of capital and capital reduction scheme. The defendant was against the idea of obtaining shareholders' mandate as he did not agree with the proposed return of capital and capital reduction scheme. The late Tan Sri Ngan attended this meeting as the newly appointed company advisor of UHB and the late Tan Sri Ngan expressed his support for the proposed return of capital and capital reduction scheme (bundle D3, at pp 104 and 105–107).

(g) To garner opposition to the proposed return of capital and capital reduction scheme and the proposed resolution for the shareholders' mandate to be put before the shareholders at UHB's AGM on 28 September 22007, the defendant publicly declared that he would set up 'the pro tern committee to defend the rights and interests of Unico Holdings Minority Shareholders' ('the defendant's committee') on 25 September 2007 (WSDW1, Q&A 41 at p 18).

(h) On 25 September 2007, the defendant called for a press conference ('press conference on 25 September 2007') (WSDW1, Q&A 42 at p 19) and during the press conference on 25 September 2007, the defendant made certain statements concerning a payment of RM2m (WSDW1, Q&A 45 at p 19).

(i) On 26 September 2007:

(i) an article appeared in *Nanyang* ('*Nanyang* Publication') where it was reported, among others, that the defendant had during the press conference on 25 September 2007 said the following words ('first impugned statement')

> (The defendant) said, yesteryear when Lim Guan Teik (the plaintiff) was still the Chairman of UHB, he had issued a cheque for the sum of RM2,000,000 in favour of Ngan Ching Wen who was then the President of Associated Chinese Chambers of Commerce and Industry Malaysia ('ACCCIM'), requesting ACCCIM to refrain from interfering with business activities of UHB.
>
> (bundle C1 at p 1 (original publication in Chinese) and pp 2–4 (English translation); and

(ii) an article appeared in *Sin Chew* ('*Sin Chew* Publication') where it was reported, among others, that the defendant had during the press conference on 25 September 2007 said the following words ('second impugned statement'):

> (The defendant) also mentioned, yesteryear UHB Chairman, Ngan Ching Wen had paid one lump sum 'reward' of RM2000,000 to Associated Chinese Chambers of Commerce and Industry Malaysia (ACCCIM), requesting ACCCIM not to interfere in the affairs of UHB, the then President of ACCCIM was Lim Guan Teik.
>
> (bundle C1 at p 5 (original publication in Chinese) and pp 6-7 (English translation).
> (the *Nanyang* and *Sin Chew* Publications shall be collectively referred to as 'impugned publications' and the first and second impugned statements shall be collectively referred to as 'impugned statements').

(j) On 27 September 2007, an emergency UHB's BOD meeting ('Emergency BOD Meeting') was called whereby the defendant was informed of the impugned statements. The defendant informed, among others, the plaintiff that the defendant had 'not released any incorrect information intentionally' but nevertheless, he would investigate the matter and if he had issued misleading press statements, he would be responsible for it (bundle B at pp 119 and 124).

(k) Subsequently, on 5 November 2007, the plaintiff instructed his then

solicitors, Messrs Chan Tse Yuen & Co to issue a letter before action to the defendant demanding a retraction of the impugned statements and an apology from the defendant ('demand')(bundle B, at pp 126-130).

(l) The defendant did not reply to the demand (WSPW1, Q&A 35 at p 34).

(m) This action was then filed whereby the plaintiff is seeking, among others, the following relief of general damages, aggravated damage and exemplary damages.

[3] The issues to be tried as from the pleadings and the statement of issues to be tried ('F') are:

(a) whether the defendant had made the impugned statements;

(b) whether the defendant is liable for the impugned publications;

(c) whether the impugned statements were defamatory of the plaintiff;

(d) whether the defendant was actuated by malice in making the impugned statements and by causing the impugned publications;

(e) whether the defendant can rely on the following defences:

(i) defence of justification;

(ii) defence of qualified privilege;

(iii) defence of fair comment; or

(iv) defence of consent; and

(f) if liability is found against the defendant, what is the quantum of damages to be awarded to the plaintiff.

FINDINGS OF THE COURT

[4] I am mindful of the common approach to be adopted in respect of the evidence:

(a) *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 (CA) approved by the Federal Court in *Gan Yook Chin dan satu lagi lwn Lee Ing Chin @ Lee Teck Seng dan lain-lain* [2001] 2 MLJ 70 ie the trial judge has to test the evidence of the witnesses against relevant criteria including:

(i) taking into account the presence or absence of any motive that a witness may in giving his evidence;

(ii) test the oral evidence of the witness against contemporary documents; and

(iii) test the evidence of the witness against the probabilities of the case;

(b) *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 (CA) that the oral evidence must be critically tested against the whole of the other evidence and the circumstances of the case (including contemporaneous documentary evidence vis-a vis a witness' subsequent recollection or version).

WHETHER THE DEFENDANT HAD MADE THE IMPUGNED STATEMENTS

[5] The defendant denies that he had made the impugned statements during the press conference on 25 September 2007 and he sets out his version pleaded in para 19 of the statement of defence as follows.

> Sometime in the past, Unico Holdings Berhad made a donation of about RM2,000,000 to ACCCIM on condition that Unico Holdings Berhad severed its administrative relationship with ACCCIM. The Managing Director of Unico Holdings Berhad at that time was Ngan Ching Wen and the Chairman of ACCCIM at that time was Lim Guan Teik.

Further, the defendant disputes that the event on 25 September 2007 was a press conference but contends it was 'merely a briefing to UHB shareholders.'

[6] Having weighed the evidence of the plaintiff, the defendant vis-a-vis the evidence of their respective witnesses and the documentary evidence, on a balance of probabilities I hold that the defendant made the impugned statements and had caused the publication of the impugned publications. First, the impugned publications constituted part of a reliable and contemporaneous record of what the defendant had said at the press conference on 25 September 2007.

[7] Notwithstanding that it was testified by PW3, Mr Lee Seng Hu the *Sin Chew Daily* reporter of the *Sin Chew* Publication that the press conference where he was present was a briefing to shareholders, yet the press was invited. This was evident also from the evidence of PW2, Miss Teoh Hwei Meng, the *Nanyang Siang Pau* reporter of the *Nanyang* Publication, and DW3, the then *Oriental Daily News* reporter of the report published on 26 September 2007 at page National A16 of *Oriental Daily News* titled 'Tan Kai Hee understands Lim Gait Tong's withdrawal' (bundle D2 pp 85-86), who are not UHB shareholders but who attended the press conference at the invitation of the defendant. Further, during cross-examination the defendant admitted that the press conference on 25 September 2007 was open to the public. If it was intended to

be meant purely as a briefing for UHB shareholders, why is there a need to call the press; the objective could be achieved by having a closed door meeting with the UHB shareholders.

[8] PW3 testified during re-examination that the Chinese characters appearing in the backdrop as shown in the photograph (bundle C1 at p 1) meant 'press conference' whilst the defendant himself confirmed the same during cross-examination.

[9] PW2 and PW3 testified the defendant was the main speaker during the press conference and he spoke in Mandarin. Although PW2 did not take down verbatim the speech by the defendant, she had taken down a summary of what was said by the defendant at the press conference and she prepared the *Nanyang* Publication immediately after she returned to her office. Other than the mistake in mentioning Tan Sri Ngan was the President of ACCCIM which PW2 was candid in admitting the said mistake, she stood by the *Nanyang* Publication.

[10] PW3 stated it was impossible to take down verbatim whatever was said at the press conference of 25 September 2007 but he took down the essential part and confirmed the *Sin Chew* Publication was prepared before 8pm the same evening after he returned to his office from the press conference on 25 September 2007.

[11] During the cross-examination of PW3, it was put to PW3 that he had made a mistake in the *Sin Chew* Publication where Tan Sri Ngan was described as UHB's chairman which PW3 disagreed. It is observed that the *Oriental Daily News* article (bundle D2 at pp 85–86) which the defendant had testified represented the 'most accurate' of the three reports also reported Tan Sri Ngan as UHB's chairman.

[12] Apart from the impugned statements, PW2 and PW3 were not challenged as to the accuracy of the other statements made by the defendant at the press conference on 25 September 2007 which have been reported by them in the impugned publications. Hence it is highly improbable for PW2 and PW3 to have misquoted the defendant in respect of the impugned statements.

[13] The defendant contends the plaintiff did not challenge the accuracy of the *Oriental Daily News* article and hence, the *Nanyang* and *Sin Chew* Publications were 'plainly wrong'. Without prejudice to what I have alluded to in relation to the *Oriental Daily News* article, I find there is no merit in the plaintiff's contention as (i) the defendant did not plead in the amended defence that the *Oriental Daily News* article represented the most accurate version among the three reports and therefore cannot rely on the same as part of his

defence; rather the defendant has pleaded the defendant's version as the version he had uttered; (ii) the plaintiff had objected to the admissibility of the *Oriental Daily News* article and it is trite law that parties are bound by pleadings and the defendant cannot raise issues which are not pleaded (*Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428 at p 432 E–F); (iii) in any event the plaintiff's counsel did ask DW3 about the accuracy of the *Nanyang* and *Sin Chew* Publications and DW3 could not answer and hence there is a challenge to DW3 on the accuracy of the same.

[14] Second, there is no reason or motive for PW2 and PW3 to bear false testimonies against the defendant as they are independent witnesses without any interest in this action.

[15] Third, it is pertinent for the court to consider the defendant's conduct subsequent to the publication of the impugned publications as they are relevant in showing that the defendant made the impugned statements (s 8(2) of the Evidence Act 1950). They are:

(a) an emergency BOD meeting was held on 27 September 2007, just two days after the press conference of 25 September 2007 which discussed amongst others, at paragraph 733.0 of the minutes of the UHB BOD Meeting the 'press statements made by Mr Tan Kai Hee' (bundle B p 119). The defendant did not deny that he uttered the impugned statements nor did he inform of the defendant's version save to state that 'he has not released any incorrect information intentionally, nevertheless he will investigate this and if he had issued misleading press statements, he will be responsible for it.'

(b) Despite the aforesaid undertaking of the defendant to the UHB's BOD during the emergency BOD meeting, the defendant never fulfilled the same. The fact that he was not re-elected as UHB director does not detract from the fact he has given the aforesaid undertaking and neither did he inform the UHB's BOD that he would not honour the same.

(c) In an article published in the *Sin Chew* on 2 October 2007, the defendant was quoted as saying:

> … the talk of RM2 million 'hush-hush' money, it was mentioned by Tan Sri Lim Guan Teik at a public event, I urge Ngan Ching Wen to do his homework and not to speak 'indiscriminately'.

(bundle C1 p 14 (original publication in Chinese) and pp 15–17(English translation). The defendant's statement was in response to an article in the *Nanyang Siang Pau* on 1 October 2007 where the late Tan Sri Ngan was refuting the accusations made against him by the defendant during a telephone interview with *Nanyang Siang Pau* (bundle C1 p 10 (original publication in Chinese) and pp 11–13 (English translation). It is

observed that the defendant did not deny that he uttered the impugned statements nor did he put forward the defendant's version.

(d) In a blog set up by the defendant and his supporters, a similar allegation as that made in the impugned statements appeared (bundle C1 pp 18–19 (original publication in Chinese) and pp 20–24 (English translation), particularly at p 23 to the effect 'Tan Kai Hee divulged, Lim Guan Teik had issued a RM2m cheque to the then ACCCIM President Ngan Ching Wen, requesting him not to interfere with UHB's internal operations. This already can prove, they were both controlling ACCCIM's operations.

(e) After the publication of the impugned publications containing the impugned statements, the defendant did none of the following:

(i) make any complaint to *Nanyang Siang Pau* or *Sin Chew* in respect of the impugned publications;

(ii) lodge any police report against *Nanyang Siang Pau* or *Sin Chew* in respect of the impugned publications;

(iii) contact PW2 or PW3 seeking *Nanyang Siang Pau* or *Sin Chew* to rectify any errors in the content of the impugned publications or to demand to withdraw the impugned publications or to put the defendant's version.

(iv) file any defamation suit against PW2, *Nanyang Siang Pau*, PW3 and/or *Sin Chew* in respect of the impugned publications and if the impugned publications were erroneously published, the defendant may commence third party proceedings against PW2, *Nanyang Siang Pau*, PW3 and/or *Sin Chew*.

(f) The defendant did not reply to the demand of the plaintiff of 5 November 2007 which corroborates the contemporaneous documentary evidence that the defendant made the impugned statements in the impugned publications.

Here I rely on the case of *Wong Hon Leong David v Noorazman bin Adnan* [1995] 3 MLJ 283 at p 289A–C where the Court of Appeal approved a passage from the judgment of Edgar Joseph Jr J in *Tan Cheng Hock v Chan Thean Soo & Anor* [1987] 2 MLJ 479 at p 487 where His Lordship alluded to the judgment of Lord Esher MR in *Wiedemann v Walpole* [1891] 2 QB 534 at p 537, who remarked, inter alia, *Here, we have only to see whether the mere fact of not answering the letters, with nothing else for us to consider is any evidence in corroboration of the promise (of marriage)* (Emphasis added.) In this instant case I find there is not merely the fact of the defendant not replying the demand of the plaintiff but there are other reasons which corroborates that the defendant made the impugned statements,

(g) Despite the fact that the defendant acknowledged there is ambiguity over the RM2m payment, he did not deny that he had made the impugned statements during his interview with a magazine called the '*Special Weekly*' on 10 December 2007 and neither did he put forward his defendant's version (bundle D2 pp 91–101 (original publication in Chinese) and pp 102–104 (English translation) at p 102. This puts paid to the defendant's submission that the defendant distanced himself from the impugned statements in the *Special Weekly* magazine.

[16] Fourth, I find the defendant's version referred to in para 5 above is but an afterthought. This can be concluded as follows:

(a) the *Oriental Daily News* article reads

> Tan Kai Hee is also the Chairman of the Commerce Committee of ACCCIM. He explained that Unico Holdings was the investment arm of ACCCIM. But 'the tie was completely cut off' under the 'Gentleman (sic) Agreement' reached during the period when Tan Sri Lim Guan Teik was the President of ACCCIM and Tan Sri Ngan Ching Wen was the Chairman of Unico Holdings whereby Unico Holdings made a RM2.0 million payment to the ACCCIM. He said that he was the then appointed Director by ACCCIM to sit on the Board of Unico Holdings.

However it is observed that the *Oriental Daily News* article which the defendant testified represented the 'most accurate' of the three reports materially differ from the defendant's version as shown in comparison tabulated by the plaintiff:

The defendant's version	Oriental Daily (News) Article
UHB made a RM2m donation to ACCCIM.	UHB made a payment of RM2m to ACCCIM. There was no reference that RM2 million was a donation.
Donation was conditional upon severance of administrative relationship between UHB and ACCCIM.	RM2m was made pursuant to a 'gentlemen agreement' between the late Tan Sri Ngan and the plaintiff.
Severance of administrative relationship between UHB and ACCCIM.	UHB was the investment arm of ACCCIM and the tie was completely cut off.

(b) the defendant contradicted himself when he said there was a 'gentlemen's agreement' between the late Tan Sri Ngan and the plaintiff whereas there is no reference to that phrase in the defendant's version.

(c) again the defendant did not inform UHB's BOD of the defendant's version and/or the *Oriental Daily News* article during the emergency BOD meeting.

(d) the defendant did not reply to the demand setting out defendant's version and/or the *Oriental Daily News* article.

(e) the defendant in cross-examination agreed that (i) the defendant did not record whether by tape record, in writing or in any other form the press conference on 25 September 2007; and (ii) the defendant's version is purely based on memory.

[17] In the light of the aforesaid evidence and adopting the principle regarding the judicial reception of oral evidence laid out in *Tindok Besar Estate* it can be concluded that:

(a) there is no contemporaneous document to corroborate the defendant's version;

(b) the defendant's subsequent conduct does not support the defendant's version was what the defendant said during the press conference of 25 September 2007;

(c) the defendant's version which appeared for the first time in the defendant's amended defence filed on 5 March 2008 was a self serving recollection and version of what the defendant contends he had said during the press conference of 25 September 2007;

(d) the defendant was asked twice in cross-examination whether he would apologise to the plaintiff if the defendant in fact publish the impugned statements and the defendant answered he would consider. This revealed the defendant is not remorseful even if assuming it is proven that he in fact published the impugned statements.

[18] Fifth, since the defendant alleges that the defendant's version is what the defendant said during the press conference on 25 September 2007 and not what was reported in the impugned publications, the onus is on the defendant to prove the same. Thus it is incumbent for the defendant to produce Mr Chow Chee Ken and Mr Yu Zhen Sheng who were seated together with the defendant at the press conference to testify whether the defendant did in actual fact utter the defendant's version. Both of them are material witnesses; however when asked whether he was calling both of them as witnesses, the defendant merely said 'I don't know because I am not in touch with them' when in fact he admitted Mr Chow Chee Ken gave evidence in ACCCIM's suit against the plaintiff. In the circumstances I am of the view an adverse inference ought to be drawn against the defendant under s 114(g) of the Evidence Act 1950 in that if Mr Chow Chee Ken and Mr Yu Zhen Sheng were called, their evidence would be unfavourable to the defendant (*Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd* [1991] 1 MLJ 33 (SC) at p 34 at p 35C–G (left), *Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 627 (CA) at p 635

A C–E, *Chan Yoke Lain (administrator of the estate of Chong Yoke Fan, deceased) v Pacific & Orient Insurance Co Sdn Bhd* [1999] 1 MLJ 303 (CA) at p 308 F–G).

[19] The defendant contends the defendant did not make any complaint or allegation that RM2m had corruptly exchanged hands between the late Tan Sri
B Ngan and the plaintiff in the oppression petition presented by, amongst others, the defendant on 30 July 2008. I find this contention is without substance as the oppression petition was presented after (i) 5 November 2007, namely after the plaintiff had made demand for which there was no reply from the defendant; (ii) 7 December 2007, after the writ indorsed with a statement of
C claim was issued; (iii) 5 March 2008, after the defence was filed by the defendant; and (iv) 27 March 2008, after the reply was filed by the plaintiff.

[20] The defendant contends the factual errors in the *Nanyang* Publication and the *Sin Chew* Publication are respectively as follows:

D

(a) (i) the plaintiff never issued a cheque in favour of Tan Sri Ngan; and

(ii) the RM2m was never paid by a cheque.

E (b) (i) Tan Sri Ngan never paid RM2m to ACCCIM; and

(ii) the payment was never made in one lump sum.

[21] The defendant contends in the absence of those factual errors 'the
F consistent Sting' in the impugned publications is the suggestion that a lump sum of RM2m exchanged hands between Tan Sri Ngan and the plaintiff as individuals; and a suggestion of bribery or corrupt practice between the two individuals disappears.

G **[22]** With respect I disagree because I agree as submitted by the plaintiff that *The sting of the libel lies in the defendant's allegation that the late Tan Sri Ngan has paid a sum of RM2m to the plaintiff, who was the then President of ACCCIM, so that ACCCIM would not interfere in the affairs of UHB. The sting of the libel is the allegation of corruption against the plaintiff.* Even if the impugned statements
H did not contain factual errors, *the sting of the libel was still present*.

[23] On the issue of whether the defendant is responsible for the republication of the impugned statements by *Nanyang* and *Sin Chew*, there is evidence from the defendant that (i) he is a prominent corporate figure; (ii) the
I most effective medium for the defendant to communicate issues concerning the proposed reduction of capital and capital reduction scheme was through the Chinese press; (iii) he called for the press conference on 25 September 2007 and invited the media to attend; (iv) he booked a conference room at Federal Hotel for the press conference on 25 September 2007 and paid for the facility;

(v) the press conference was open to the public; (vi) the defendant did not restrict who could attend the press conference and (vii) the defendant was the main speaker as testified by PW2 and PW3.

[24] In the light of the aforesaid evidence, following the case of *Sims v Wran* [1984] 1 NSWLR 317 at p 320C the natural and probable result of the defendant's act as a prominent corporate figure would be what he said at the press conference on 25 September 2007 would be republished in the media and the defendant must be responsible for the republication of the impugned statements in the impugned publications.

WHETHER THE IMPUGNED STATEMENTS ARE DEFAMATORY OF THE PLAINTIFF

[25] It is trite that whether the words are capable of a defamatory meaning is a question of law which the trial judge must decide (see *Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371 (CA) at p 374E and the test to be applied is an objective one of whether the words published in their natural and ordinary meaning impute to the plaintiff any dishonourable or discreditable conduct or motives or a lack of integrity on his part (per Gopal Sri Ram at p 374 H–I) (see also *Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub v Bre Sdn Bhd & Ors* [1996] 1 MLJ 393 at p 402H–403B) approved by Court of Appeal in *Bre Sdn Bhd & Ors v Tun Datuk Patinggi Hj Abdul Rahman Ya'kub* [2005] 3 MLJ 485 at p 490H–I and *Chok Foo Choo* at pp 374–375A).

[26] There is no dispute that the impugned statements referred to the plaintiff albeit there is a slight confusion as regards his role in the two organisations, UHB and ACCCIM. The defendant did not put to PW2 and PW3 during cross-examination that the impugned statements did not refer to the plaintiff. Thus the first element of whether the words complained of referred to the plaintiff is satisfied.

[27] The defendant contends it is not permissible to read the impugned publications in their entirety. With respect I disagree.

[28] To determine if the impugned statements are defamatory of the plaintiff, in my view, the context and circumstances in which the impugned statements were made must be taken into consideration (see *AJA Peter v OG Nio & Ors* [1980] 1 MLJ 226 (HC) at pp 2331 (right) – 234A (left)).

[29] Thus based on the contents of the *Nanyang* Publication, the first impugned statement was made in the following context (WSPW1 Q&A 9; bundle C1 pp 2–4):

(a) as a few major shareholders in UHB were also major shareholders in UDPB, the manner of seeking the shareholders' mandate to implement the Proposed Return of Capital and Capital Reduction Scheme during the AGM was clearly in a position of conflict of interest;

(b) although UHB was the parent company of UDPB, UHB did not gain any profit in recent years. It was an unusual practice for UHB's BOD to propose a reduction of UHB's capital;

(c) UHB initially held 51% shares in UDPB. However, certain persons responsible in UHB's BOD continued to sell shares in private and did not openly brief the shareholders and other directors of UHB. As a result, UHB's shareholding in UDPB had been reduced to 28.9%;

(d) annual reports presented to the shareholders of UHB did not mention the fact that the shareholding of UHB in UDPB had reduced to 28.9%. The defendant said that part of the shares sold was acquired by the major shareholders of UDPB. The defendant emphasised that the Proposed Return of Capital and Capital Reduction Scheme was certainly related to the interest of the major shareholders;

(e) the directors of UHB who held substantial shares in both UHB and UDPB included, among others, the late Tan Sri Ngan and the plaintiff. The defendant remarked that the major shareholders had personally and indirectly acquired the shares of both companies;

(f) after making the First impugned Statement, the defendant went on to say that the purpose of ACCCIM forming UHB in 1984 was to strengthen ethnical enterprise. However, since UHB was gradually side-lined and on the other hand, UDPB was highly regarded, there was a possibility which could not be ruled out that UHB's BOD, of whom the plaintiff was the Chairman, planned the Proposed Return of Capital and Capital Reduction Scheme to increase their shareholding control in UDPB for the sake of their own benefit; and

(g) UHB's BOD had decided to proceed with the implementation of the Proposed Return of Capital and Capital Reduction Scheme notwithstanding the objections of the defendant and a few other directors of UHB and UHB's BOD had totally disregarded the interest of UHB's minority shareholders.

[30] Further, reading the first impugned statement in its entirety, it left reasonable readers with the impression that (WSPW1 Q&A 11):

(a) UHB's BOD, of which the plaintiff was the chairman, was acting in a position of conflict of interest;

(b) a few members of UHB's BOD who were also substantial shareholders of

UHB and UDPB ('Group'), of which, according to the defendant, the plaintiff was one of the Group

(i) were making secret profits and acting to the detriment of UHB's interest by selling UHB's shares in UDPB without informing UHB's shareholders; and

(ii) suggested the Proposed Return of Capital and Capital Reduction Scheme with the ulterior motive of gaining control in UDPB; and

(c) in order for the Group to acquire shares in UHB and UDPB in stealth, the defendant alleged that the plaintiff, as Chairman of UHB, gave a sum of RM2 million to the late Tan Sri Ngan, as President of ACCCIM so that ACCCIM would not interfere with the business of UHB.

[31] Based on the contents of the *Sin Chew* Publication, the second impugned statement was made in the following context (WSPW1 Q&A 13; bundled pp 6-7)

(a) the Proposed Return of Capital and Capital Reduction Scheme by UHB's BOD was manipulated by some people with ulterior motives;

(b) the UHB's directors who were involved, were major shareholders in both UHB and UDPB and there was a position of conflict of interest in respect of the Proposed Return of Capital and Capital Reduction Scheme;

(c) shares of UHB and UDPB owned by 5 principal directors of UHB had obviously been moved and acquired and those directors could control the future of both UHB and UDPB; and

(d) the plaintiff was one of the 5 principal directors.

[32] Further, reading the second impugned statement in its entirety, it left reasonable readers with the impression that (WSPW1 Q&A 14) that

> the defendant was clearly suggesting various improprieties on the part of the 5 directors of UHB of which the plaintiff was one of them. In this regard, an incident cited by the defendant in support of his allegation of impropriety was that the late Tan Sri Ngan had offered a 'reward' of RM2 million to ACCCIM so that ACCCIM would not interfere with the business of UHB. The defendant had placed emphasis on the fact that the plaintiff was the then President of ACCCIM.

[33] Viewed objectively and reading the impugned publications in its entirety, I am of the opinion that the ordinary man has a strong tendency to infer the following meaning to the impugned statements:

(a) the plaintiff had corruptly received or agreed to receive for himself or for ACCCIM gratification in the sum of RM2m from the late Tan Sri Ngan, as an inducement to or reward for forbearing to interfere with the affairs of UHB;

A

(b) the plaintiff was corrupted;

(c) the plaintiff had committed a crime;

(d) the plaintiff was not a law abiding citizen;

(e) the plaintiff was dishonest;

B

(f) the plaintiff was unethical;

(g) the plaintiff was devoid of integrity;

(h) the plaintiff was not fit to hold office in ACCCIM; and

C

(i) the plaintiff was an undesirable element who should not be accepted by society.

(paras 5(a), (c) to (k) of the statement of claim).

D

[34] Thus the impugned statements is in my view defamatory of the plaintiff as they were 'calculated to expose the (plaintiff) to hatred, ridicule or contempt in the mind of the reasonable man or would tend to tower the (plaintiff) in the estimation of right thinking members of society generally' (see *Bre Sdn Bhd* at p 490H–I).

E

[35] The defendant contends the reasonable reader would have read all three reports, would be confused, would have nothing more of them and would not have been able to identify a common sting in the three reports. With respect I disagree.

F

[36] It is highly unlikely that a reasonable reader would have read all three reports. The sting of the libel of the impugned publications lies in the defendant's allegation referred to in *para 12.2* above. A reasonable reader would be able to identify the 'corruption' sting of the libel in the impugned statements in that the defendant alleged that the late Tan Sri Ngan has paid a sum of RM2m to the plaintiff who was the then President of ACCCIM so that ACCCIM would not interfere in the affairs of UHB.

G

[37] The defendant contends UHB's shareholder would not have found the innuendo meaning to be defamatory of the plaintiff for the reasons:

H

(a) It was a matter in the past which is of little relevance to him.

(b) Having read the Circular and knowing of the resolution tabled at the 1999 EGM he would have known that it is simply not ture that Tan Sri Ngan paid RM2 million to the plaintiff (*Nanyang*) or that Tan Sri Ngan paid RM2 million to ACCCIM (*Sin Chew*). He would therefore have dismissed the Impugned Paragraphs as erroneous reporting and thought no more of it.

I

With respect I disagree.

[38] In the event I am wrong in my finding that the impugned statements in their natural and ordinary meaning is defamatory of the plaintiff, I hold the impugned statements contain innuendo which is defamatory of the plaintiff. To determine this in the context of the present case, I will have to examine whether:

(i) the plaintiff has shown extrinsic facts 'known to one or more of those persons to whom the words were published, which wouid cause the words to convey the defamatory imputation on which he relies to a reasonable person with that knowledge' (see *R Murugason v The Straits Times Press (1975) Ltd* [1984] 2 MLJ 10 at p 15H–I); and

(ii) whether the publication of the impugned article is in a newspaper of a wide circulation whereby 'the only reasonable inference is that some of the readers of that newspaper must have knowledge of the facts which are said to give rise to the innuendo'.

(see *Grappelli v Derek Block (Holdings) Ltd* [1981] 1 WLR 822 at p 830A).

[39] There is evidence from PW2 and PW3 that the *Nanyang* and *Sin Chew* newspapers are of wide circulation. Coupled with this is the testimony from the defendant that most shareholders of UHB read major Chinese newspapers with wide circulation.

[40] In the instant case, the following facts are undoubtedly within the knowledge of the shareholders of UHB:

(a) the relationship between ACCCIM and UHB as is evident from UHB's Circular to shareholders dated 6 September 1999 ('the circular') bundle B pp 23-38);

(b) the plaintiff who was the chairman of UHB was also the President of ACCCIM (bundle B p 29);

(c) the late Tan Sri Ngan was the managing director of UHB (bundle B p 29);

(d) both the plaintiff and the late Tan Sri Ngan were members of the UHB's BOD that proposed to UHB's shareholders that UHB contribute a lump sum payment of RM2m to ACCCIM ('the donation') (bundle B pp 23–118);

(e) the donation was recommended as a sign of gratitude towards ACCCIM for its role in promoting the formation of UHB and the roles played by the officials of ACCCIM who were also directors of UHB (bundle B p 40).

[41] Hence I am of the view undoubtedly any reader with the aforesaid

A background knowledge when reading the impugned statements would reasonably infer the defamatory imputations alluded to in para 18 above.

WHETHER THE DEFENDANT CAN AVAIL HIMSELF OF HIS DEFENCES

B

[42] Now that the court has found that the impugned statements are defamatory of the plaintiff and have been published, the onus is on the defendant to prove whether he can rely on the defences of justification, qualified privilege, fair comment, consent and abuse of process of court.

C

QUALIFIED PRIVILEGE

[43] In *Seaga v Harper* [2008] 1 All ER 965 at p 968 Lord Carswell opined:

D

> The defence of qualified privilege … is founded upon the need to permit the making of statements where there is a duty, legal, social or moral, or sufficient interest on the part of the maker to communicate them to recipients who have a corresponding interest or duty to receive them, even though they may be defamatory, so long as they are made without malice, that is to say, honestly and without any indirect or improper motive … The development of the law is accurately and conveniently expressed in *Duncan and Neill on Defamation* (2nd Ed), 1983, p 93 (para 14.04):

E

> 'From the broad general principle that certain communications should be protected by qualified privilege *'in the general interest of society'*, the courts have developed the concept that there must exist between the publisher and the publishee some duty or interest in the making of the communication. (Emphasis added.)

F

[44] The crux of the defence lies in the reciprocity of interest between the maker (the defendant) and the recipient (the public at large, including the minority shareholders of UHB). They had a common and corresponding interest in the subject matter of the impugned statements; the maker was under a legal and/or moral and/or social duty to publish whilst the recipient had a like interest to hear them; and the maker allegedly published in the reasonable and necessary protection of his own interests and/or the interests of the recipient (see para 23 (b)(i), (ii) and (iii) of the statement of defence).

G

H

[45] According to *Gatley on Libel and Slander* (10th Ed) 2004 at p 384 fn 34, an example of such reciprocity is 'communications between shareholders and employees of a company about a takeover'. Given the history between ACCCIM and UHB, the defendant's role in the Unico National Public Issue Working Committee, his position in ACCCIM and UHB at the material time and he was launching the defendant's committee on the press conference on 25 September 2007, I am of the view the defendant has a 'duty, legal, social or moral' to inform the shareholders of matters which he honestly believed

I

affected the shareholders who were facing an impending AGM three days later (28 September 2007). They are entitled to expect their directors to make full disclosure of all matters that are relevant to them to allow them to make an informed decision (see *Corporate Powers Accountability*, (2nd Ed) by Loh Siew Cheang, pp 749–752). In other words, the shareholders have a 'sufficient interest' to receive the information that the defendant is communicating to them.

[46] The plaintiff contends the defence of qualified privilege must fail because the impugned statements were published to the public at large and there is no interest in the public to receive the impugned statements. The plaintiff further contends that the impugned statements contained in the impugned publications have wide circulation; did not concern matters of public interest or policy; and the defendant is neither a politician nor a government official; therefore the defendant has failed to establish there was any interest or duty for the defendant to broadcast the impugned statements *beyond the shareholders of UHB* and there was any interest in the readers of the impugned publications to receive the information conveyed in the impugned statements.

[47] With respect I disagree as I am of the view that the defence of qualified privilege is available to the defendant. The plaintiff's usage of the phrase 'beyond the shareholders of UHB' appears to imply that there may be an interest or duty on the part of shareholders of UHB. Notwithstanding that it was pleaded 'the public at large' had a common and corresponding interest in the impugned statements, but this term was also pleaded to include 'the minority shareholders of UHB'; hence nothing turns on this aspect of the pleading. As the defendant correctly submits, the target audience of the information was the shareholders in conjunction with the launching of the defendant's committee. This was confirmed by PW3 who said that although styled as a 'press conference', it was in reality a briefing to the shareholders, (NOP on 4 April 2012, Q&A 214–216). In addition, the defendant explained he had invited the press as it was an effective medium for him to communicate to the shareholders as this was also agreed to by the plaintiff who said other effective means of communicating with the shareholders of UHB included nationwide tours by the BOD and open letter to the press.

FAIR COMMENT

[48] For the defence of fair comment to succeed the defendant has to establish the following basic elements:

(i) that the words complained of are comments, though they may consist of or include inference of facts;

A

(ii) that the comments are on a matter of public interest; and

(iii) that the comments are based on facts, truly stated. They must also be fair and which a fair-minded person can honestly make on the facts proved (see *JB Jeyaretnam*).

B

On element (i), it is settled law that a comment is a statement of opinion on facts truly stated. A libellous statement of fact is not a comment or criticism on anything (see *Lee Kuan Yew v JB Jeyaretnam* [1979] 1 MLJ 281). In order to decide whether a statement is capable of being a comment or a statement of fact, should be gathered from the document wherein the words complained of are found. There is no necessity to look at other documents, though relevant, to come to such

C

determination (see *Telnikoff v Matusevitch* [1991] 4 All ER 817).

(per Richard Malanjum J (as His Lordship then was) in the case of *Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub* at p 408 F and the Court of Appeal affirmed the said decision in *Bre Sdn Bhd* at pp 4921–493A).

D

[49] As to whether it is necessary for the court to address on the issue of the proof of the required elements for the defence of fair comment, it is appropriate for me to first consider whether there is merit in the plaintiff's argument that the defendant cannot rely on fair comment because of non-compliance with

E

O 78 r 3(2) of the Rules of the High Court 1980 which provides (the relevant parts)

Where in an action for libel or slander the defendant alleges that, … and in so far as they consist of expressions of opinion, they are fair comment on a matter of public

F

interest, or pleads to the like effect, he must give particulars stating which of the words complained of he alleges are statements of fact …

[50] The defendant pleaded in para 24 of the amended defence:

G

Further or in the alternative, if (which is denied) the defendant spoke and published the said Words, they are fair comment upon a matter of public interest.

Thereafter the defendant repeats the facts pleaded in paras 5–17 of the amended defence. The defendant submits that the pleading requirement under

H

O 78 r 3(2) of the RHC has been complied.

[51] With respect I disagree. In my view the defendant must particularise which are the words in the impugned statements of the plaintiff are comments and which are facts; the defendant's reliance on the particulars in paras 5–17 of

I

the amended defence do not comply with the requirement of O 78 r 3(2) of the RHC as the defendant has failed to show what are the words in the impugned statements that are comment and those that are facts.(see *Dato' Dr Tan Chee Khuan v Chin Choong Seng @ Victor Chin* [2011] 8 MLJ 608 at pp 623–624; [2011] 8 CLJ 574 (HC) at pp 589D–591B).

[52] The defendant submits the comment in the part of the *Nanyang* and *Sin Chew* Publications was to suggest that ACCCIM was requested to *'refrain from interfering with the business activities of UHB' or not 'to interfere in the affairs of UHB'*. I agree with the plaintiff's submission that the defendant cannot refer and rely on these purported comments as they were not pleaded in the amended defence.

[53] Hence I agree with the plaintiff's submission that the defence of fair comment is wholly unsustainable because based on para 4 of the amended defence, the defendant has failed to comply with O 78 r 3(2) of the RHC. With this finding, I am of the view it is not necessary for me to discuss any further whether the defendant has proven the elements required to establish fair comment.

QUALIFIED PRIVILEGE — WHETHER VITIATED BY MALICE?

[54] It is trite law that the defendant's defence of qualified privilege may be defeated by the plaintiff proving that the defendant was actuated by malice. In deciding on the issue of proof of express malice, both the plaintiff and defendant rely on the case of *Horrocks v Lowe* [1975] AC 135 Lord Diplock at p 149H–150B opined:

> *The motive with which a person published defamatory matter can only be inferred from what he did or said or knew. If it be proved that he did not believe that what he published was true this is generally conclusive evidence of express malice, for no sense of duty or desire to protect his own legitimate interests can justify a man in telling deliberate and injurious falsehoods about another*, save in the exceptional case where a person may be under a duty to pass on, without endorsing, defamatory reports made by some other person.
>
> Apart from those exceptional cases, what is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published or, as it is generally though tautologously termed, 'honest belief'. *If he publishes untrue defamatory matter recklessly, without considering or caring whether it be true or not, he is in this, as in other branches of the law, treated as if he knew it to be false*. (Emphasis added.)

[55] According to the defendant the acid test is that of a dominant improper motive on the part of the defendant to injure the plaintiff. In this context, the defendant urges the court to reject the plaintiff's case of malice as an afterthought by relying on a contemporaneous document, an article in the *China Press* titled 'My Summary On Unico's Turmoil' dated 9 October 2007 (bundle D1 pp 37–47) whereby the defendant submits is Tan Sri Ngan's eloquent commendation of the defendant's motives'. The paragraphs from the article referred to by the defendant are:

A [at p 38] Since Kai Hee loves our Chinese Community so much, *hope that he will do the same as to the issues of our Chinese Community; speak boldly to uphold justice; lead the Chinese Community in protecting our rights and interests* … Due to his capabilities, he was attracted by the board to join the board of directors in Unico in 1990, hoping that he can offer advises for pursuing profits for the shareholders. I was not the
B initiator for the early Unico Holdings, and I am not sure whether Kai Hee was one of the initiators. What I am sure is that, when I was the chairman of the work committee for the shares floatation, he was then a member in the committee.

[p 42] Tan Kai Hee *should have come forward earlier* in 2004, 2005 and 2006 to restructure the board, to remove those directors who dominated the posts which
C meant for specified duties but failed to do so. Regrettable was, his reaction was a bit late and his action as a bit slow. I do not agreed with what he said, because I realised *practically in the present society, to have a group of people who have public morals like Tan Kai Hee apparently, it is uncommon.*

D [p 43] Kai Hee *shouted loudly for safe-guarding Unico Holdings*, giving an impression that he is protecting Unico and also safe-guarding the investments of the twenty-two thousand minor shareholders from turning valueless. *He is a safe-guarding hero*. (Emphasis added.)

E **[56]** Relying on the aforesaid paragraphs, the defendant submits Tan Sri Ngan (i) recognised the defendant's 'public morals' and desire in 'safe-guarding Unico Holdings'; and (ii) described the defendant as a 'safe-guarding hero' and urged him to 'speak boldly to uphold justice; lead the Chinese Community in protecting our rights and interests.' The defendant further submits the plaintiff
F 'unhesitatingly associated himself' with those comments.

[57] With respect I cannot accept the defendant's contention. I agree with the plaintiff that the defendant has been selective in quoting the extracts from the article without referring to it in its entirety and purpose. The contention of
G the defendant collapses when one looks at what the late Tan Sri Ngan clearly stated in the article pertaining to the impugned statements:

(a) In bundle D1, at p 37 — 'For the passed (sic) few days, Kai Hee (defendant) had made few statements to the press. He said he is
H disappointed with Ngan Ching Wen; Ngan Ching Wen is obstinately stuck to a wrong course, etc. *Upon reading his statements, I can only reply that I am more disappointed with him* … This would cause plausible accusations on me, which I have to take out my own money to make a reply. In future, *I will not make any reply statements made by Kai Hee, but*
I *I will reserve my legal right* (bundle D1 p 37); and

(b) In bundle D1, at p 42 — *As to Ngan Ching Wen had gave two million to Lim Guan Teik to shut his mouth, I will like to convey to Kai Hee that you have belittling (sic) Ngan Ching Wen and Lim Guan Teik.*
(bundle D1 p 42) (Emphasis added.)

[58] On the other hand on a balance of probabilities I find the plaintiff has established that when the defendant made the impugned statements, he was actuated by malice. In this regard I am inclined to agree with the plaintiff's submission as follows:

(a) It is undisputed that

(i) the defendant was present during UHB's 67th BOD meeting held on 16 December 1994 where the Donation was first proposed (bundle B, p 1, at paragraph 274.5, p 6);

(ii) the defendant was present during UHB's 89th Executive Committee meeting held on 2 March 1995 where it was resolved that the monthly contribution of RM10,000 to ACCCIM should continue until the issue of Donation was finalised (bundle B, p 8, at paragraph 2.6, at p 10);

(iii) during UHB's 76th BOD meeting held on 25 September 1997 ('76th BOD Meeting'), it was resolved that the Donation be recommended for shareholders' approval during an AGM and/or EGM of UHB ('Recommendation') (bundle B, p 13, at paragraph 338.4, p 16). Although the defendant was not present during the 76th BOD Meeting, he had actual knowledge of the discussions that took place during the 76th BOD Meeting when the minutes of the 76th BOD Meeting was tabled for confirmation during UHB's BOD meeting held on 12 November 1997 when the defendant was present (bundle C2, paragraph 340, at p 1);

(iv) during the material time when UHB's BOD approved the Donation, the plaintiff was not the President of ACCCIM (WSPW1, Q&A 20, at p 21). The defendant was fully aware of this as he was the Vice-President of ACCCIM between 1997 to 2001 (WSDW1, Q&A 1, at p 2);

(v) the defendant was present during UHB's 81 BOD meeting held on 28 January 1999 when UHB's BOD re-confirmed the Recommendation (bundle B, p 17, at paragraph 392.6, p 19);

(vi) the defendant was a director of UHB when the Circular was issued. The Donation was proposed to UHB's shareholders under Part B of the Circular (bundle B, p 23, at p 289);

(vii) the Donation was passed by UHB's shareholders during the EGM held on 22 September 1999 (WSFW1, Q&A 23, at p 22).

(b) The defendant in his own evidence further reconfirmed that the impugned statements were not correct where he testified that

(a) RM2m was never paid in one lump sum; and

(b) RM2m was not a reward from UHB to ACCCIM (WSDW1, Q&A 55, at p 24).

[59] Further, based on the aforesaid facts, I agree as submitted by the plaintiff that:

(a) the defendant had actual knowledge that the donation was

(i) a token of appreciation from UHB to ACCCIM for ACCCIM's assistance to UHB in the past; and

(ii) duly approved by UHB's shareholders;

(b) the defendant had no honest belief in the truth of the impugned statements since he was at the material time a director of UHB and an office-bearer of ACCCIM when the Donation was approved by UHB's shareholders;

(c) the defendant did not care whether the impugned statements were true or false despite the fact that the defendant, as a director of UHB and an office-bearer of ACCCIM at the material time when he made the impugned statements, had access to the minutes of meetings of UHB's BOD and the information was readily available for the defendant to verify; and

(d) the defendant brought up the issue of the Donation –

(i) more than 8 years after UHB's shareholders had approved the Donation (1999); and

(ii) during the press conference on 25 September 2007 where the defendant made various statements pregnant with insinuations that the plaintiff had ulterior motives in moving for the proposed return of capital and capital reduction scheme.

REYNOLDS DEFENCE — WHETHER APPLICABLE

[60] The defendant submits that a 'new defence' called the *Reynolds* defence referred to in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 is applicable based on the following arguments:

(a) the defendant relies on the case of *Jameel v Wall Street Journal Europe SPRL* [2006] UKHL 44 where Lord Hoffmann held that the *Reynolds* defence was also available to those who published defamatory statements to the world at large as the *Reynolds* defence was initially thought to be available only to journalists;

(b) the current jurisprudence on the *Reynolds* defence is found in Lord Carswell's speech in *Seaga*'s case at pp 968–971 at paras 6, 8,10 and 11 basically to the effect that 'The *Reynolds* defence was not available only to the press and broadcasting media but extended to publications made by any person who published material of public interest in any medium so long as the conditions applicable to 'responsible journalism' were satisfied.';

(c) the *Reynolds* defence was applied in Malaysia in *Tan Sri Dato' Tan Kok Ping, JP Iwn The New Straits Times Press (M) Bhd dan lain-lain dan satu lagi guaman* [2010] 2 MLJ 694 and *Sivabalan a/l P Asapathy v The New Straits Times Press (M) Bhd* [2010] 9 MLJ 320 at p 340 para 37:

> The *Reynolds* privilege was considered and applied by the High Court in the case of *Tan Sri Dato' Tan Kok Ping, JP Iwn The New Straits Times Press (M) Bhd dan lain-lain dan satu lagi guaman* [2010] 2 MLJ 694; [2010] 3 CLJ 614. *For myself, I would hold that this new defence is available to the defendants. I think we need to move with the times and we also need to view the situation with today's eyes. A number of countries with common law traditions comparable to those of Malaysia have moved in recent years to modify the law of defamation to provide greater protection for communication on matters of public interest The Reynolds privilege represents a reasonable and proportionate response to the need to protect reputation while sustaining the public exchange of information that is vital to modern Malaysian society.* (Emphasis added.)

[61] I am of the view that the *Reynolds* defence is not available to the defendant for the following reasons:

(a) the *Reynolds* defence was not pleaded in the amended defence;

(b) the defendant did not cite that Justice Zawawi Salleh's ruling in *Sivabalan*'s case that:

> … the defence of qualified privilege in the form of Reynolds privilege to apply, two requirements must be shown to exist, namely:
>
> (a) that the publication concerned a matter of public interest; and
>
> (b) that the steps taken to gather, verify and publish the information were responsible and fair ('responsible journalism') …;

(c) the defendant alleged the defendant's version was uttered in the interest of UHB's shareholders which is not in the public interest;

(d) the defendant did not take any step to verify the accuracy of the impugned statements, the defendant's version and the *Oriental Daily News* article.

DEFENCE OF CONSENT (AQUIESCENCE AND ESTOPPEL)

[62] The defendant submits (i) the plaintiff, despite being aware of his right of action, nonetheless led the defendant to believe that such a right of action would not be enforced citing *Mount Cook Group Ltd v Johnstone Motors Ltd* [1990] 2 NZLR 488 at pp 499–500; and (ii) there is evidence of acquiescence

which creates an estoppel against the plaintiff citing *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331 at p 347.

[63] The defendant further submits two things occurred after the publication of the impugned publications on 26 September 2007 namely:

(a) At UHB's EGM on 27 September 2007, the plaintiff questioned the defendant about the impugned statements and relies on the following record in the minutes of the UHB's EGM on 27 September 2007 (bundle D3 pp 112–118) particularly:

> Tan Sri Chairman advised the Directors not to make further statement to the reporter until tomorrow's Annual General Meeting. Mr Tan declared that he would continue talking to the press. On learning this, Tan Sri Chairman retracted his advice and allowed any director or directors of the Board to make press statements.;

(b) Tan Sri Ngan's alleged commendation of the defendant in the article titled 'My Summary On Unico's Turmoil' dated 9 October 2007 (see para 28.2 above) and the plaintiff associated himself and agreed with these comments.

[64] In my judgment the defendant's aforesaid contention is misconceived for two reasons. First, the plaintiff during the UHB's EGM on 27 September 2007 clearly stated (bundle D3 p 117):

> Tan Sri Chairman was discontented with Mr Tan disclosing to the media that his shareholdings in UDPB was 5,384,000. Tan Sri Chairman also informed Mr Tan that in accordance with the Annual Report of UDPB his shareholdings stood at 3,520,059 shares only and that Mr Tan's allegation that Tan Sri Ngan Ching Wen in his then capacity of a Managing Director of the Company had given RM2.0 million to the then Chairman of ACCCIM so that it would not interfere into the Company's matter is baseless. Tan Sri Chairman clarified that the RM2.0 million was donated by the Company to ACCCIM for its operating fund. Tan Sri Chairman requested Mr Tan to rectify it with the press.

[65] Second, Tan Sri Ngan's so called commendations of the defendant cannot stand for the reasons stated in paras 28–28.2 above.

ABUSE OF PROCESS OF COURT

[66] The defendant submits this libel suit was among three other libel suits (where the plaintiff is a party) which were filed before the 26th AGM/EGM and injunctions were sought to restrain the defendant from repeating the

statements complained of in those suits. The defendant took the view the plaintiff was using the 'libel writ as a means to gag legitimate debate' on the affairs of UHB.

[67] I agree with the plaintiff's submission that (i) the defendant has failed to produce any evidence to substantiate the defendant's contention; (ii) the impugned statements do not strictly relate to the management of UHB but concerns an allegation of corruption between the plaintiff and the late Tan Sri Ngan (before he passed on) and the defendant.

[68] The plaintiff submits it is an abuse of process if a suit is filed to serve an ulterior purpose or to oppress the defendant or to leave it hanging over his head with no intention to bring it to a conclusion citing *Jasa Keramat Sdn Bhd & Anor v Monatech (M) Sdn Bhd* [1999] 4 MLJ 637 at p 645 and the case of *Wallersteiner v Moir, Moir v Wallersteiner* [1974] 3 All ER 217.

[69] The case of *Unico Holdings Berhad v Lee Sack Choon & Ors* [2009] MLJU 1483 cited by the defendant can be distinguished. It pertains to the plaintiff's application seeking a declaratory relief relating to a resolution of shareholders which was not tabled at the AGM unlike the present case which is per se a claim in libel. The court held the prayer sought by the plaintiff is one seeking an opinion from the Court in the guise of declaration and the court is not obliged to give opinions for parties. The court held the plaintiffs conduct of filing the suit with a view to circumvent any debate is an abuse of process and had the occasion to refer to – (i) *Jasa Keramat Sdn Bhd*; and (ii) *Waliersteiner* where 'Mr Moir, a minority shareholder in a public company sent a circular to the other shareholders accusing Dr Waliersteiner, a man of influence in the City of London and who had control of 80% of the shares in the company, of fraud, misfeasance and breach of trust. Dr Waliersteiner issued a writ and obtained an injunction against Mr Moir. Subsequently, at a general meeting of the company, Dr Waliersteiner evaded all awkward questions by relying on the *sub judice* doctrine.' Hence in my view the cases of *Jasa Keramat Sdn Bhd* and *Waliersteiner* are not applicable.

QUANTUM OF DAMAGES

[70] The plaintiff claims for general, aggravated and exemplary damages. The defendant submits there is no basis for the plaintiff to be awarded aggravated and exemplary damages because:

(i) that the defendant's primary defence is that he never uttered the Sting;

(ii) he never repeated the Sting at the three occasions that presented itself immediately after the press conference;

(iii) he took steps to explain and distance himself from the Sting;

(iv) the Sting only lasted for 2 1/4 months;

(v) Tan Sri Ngan's laudatory opinion of the defendant (which the plaintiff agreed with);

(vi) the plaintiff never suffered adversely as a result of the *Nanyang* and *Sin Chew* reports;

(vii) the BOD Emergency Meeting, the plaintiff acquiesced to the directors speaking to the Press;

(viii) the lapse of time between the reports in 2007 and the trial of this action, which was the plaintiff's own doing for being pedestrian in moving this case forward;

(ix) that the defendants statements at the press conference were matters of legitimate debate in a corporate democracy as recognised in *Wallersteiner v Moir*;

(x) the defendant had a legitimate basis for his opinions regarding the severance of ties between ACCCIM and UHB; and

(xi) the defendant had no reason nor intention of injuring the plaintiff.

[71] As for compensatory damages or general damages, the plaintiff submits the quantum should be far lower than that awarded in *Datuk Seri Utama Dr Rais bin Yatim v Amizudin bin Ahmat* [2012] 2 MLJ 807. In *Rais bin Yatim* the quantum of RM300,000 damages (compensatory, aggravated and exemplary damages) was awarded in respect of a blog which contained information 'fished out of hearsay information and without verification' and was upheld by the Court of Appeal.

[72] In determining the award of damages in an action for defamation, the claimant need not allege that actual damage has resulted from the words complained of as 'The law presumes some damage will flow in the ordinary course of things from the mere invasion of his absolute right to reputation' and he is entitled to general damages as the court may properly award (Gatley on *Libel and Slander*, para 28.27 pp 983–984; *English and Scottish Co-operative Properties Mortgage and Investment Society Ltd v Odhams Press Limited* [1940] 1 KB 440 (English Court of Appeal) at p 461).

[73] In this instant case the court has awarded to the plaintiff general and aggravated damages in the sum of RM200,000. The court took into account the following factors:

(a) the position and standing of the plaintiff

(i) it is not in dispute that the plaintiff is a highly successful corporate figure with extensive involvement in various Chinese guilds and

associations. The defendant admitted during cross-examination that a good reputation is 'very important' in commerce and business;

(ii) the plaintiff was formerly the President of ACCCIM to which the subject matter of the impugned statements was related;

(iii) the plaintiff's position in society is recognised by the country whereby he has been awarded the title 'Tan Sri' - the second most senior federal title; and

(iv) the question of 'face' carries a very important meaning in the Chinese community. In fact, the defendant agreed with the plaintiff's counsel during cross-examination that 'face' is important for Chinese businessmen;

(b) the sting of the impugned statements lies in an allegation of corruption which is a very serious offence considering that the issue of corruption has always been a hotly discussed topic in Malaysian community;

(c) the impugned statements were published by *Nanyang* and *Sin Chew*, 2 of the major Chinese newspapers in Malaysia with very wide circulation all over the country;

(d) the conduct of the defendant from the time of publication of the impugned statements to the time of trial

(i) the defendant did not retract or apologise during the Emergency BOD Meeting;

(ii) the defendant did not fulfil the defendant's Undertaking;

(iii) the defendant's further statement on 2 October 2007 did not apologise or withdraw the impugned statements;

(iv) similar allegation as that of the impugned statements appeared in the Blog;

(v) the defendant did not retract the impugned statements or apologise in the Special Weekly Magazine;

(vi) the defendant did not reply to the Demand;

(see paragraph 8(a) to (g) above)

(vii) the defendant continued to mount defamatory allegations against the plaintiff during the course of the trial

(1) the defendant continued to insinuate that the plaintiff was guilty of various wrongdoings in his examination-in-chief ('defendant's Insinuation');

(A) … (Tan Sri Ngan and the plaintiff) held the trust and confidence of ACCCIM and they were going to succeed Tan Sri Wee at ACCCIM and UHB. I had no reason to doubt or suspect that they were acting other than in the best interests of ACCCIM, as I was. It was only in December 2006 that l realised that something was amiss. (WSDW1, Q&A19, at p 10);

(B) … All in all, what this means is that Tan Sri Ngan and his associates, which

A included (the plaintiff), would further entrench their control over UHB and UDPB, without the link to ACCCIM. (WSDW1, Q&A24, at p 12);

(C) I was concerned at the speed at which the Proposal was moving. It also seemed wrong that the Proposal would result in ACCCIM losing UDPB and the Sabah Land. We were, after all, directors of UHB tasked and trusted with the duty of safeguarding ACCCIM's interest. I further sensed that there were ulterior motives at play. There was simply a lack of transparency in the Proposal. I therefore urged restraint and asked for time to further consider the Proposal in order for me, as trustee, to report the status to ACCCIM the goings-on in UHB. (WSDW1, Q&A 25, at p 13);

(D) … That was not in the interests of ACCCIM, who I represented at the BOD. In fact, as I understood it, every director of UHB held the trust and confidence of ACCCIM and would act in the interest of ACCCIM. The exercise was therefore wrong and a breach of trust and confidence reposed by ACCCIM on us as directors. This was to undo 25 years of history. (WSDW1, Q&A 29, at p 14);

(E) The speed and manner in which the Proposal was being put through made me suspicious of the manner in which the affairs of UHB and UDPB were being conducted by the 6 of the Directors, including Tan Sri Ngan and (the plaintiff), who were in control of both companies. … (WSDW1, Q&A 31, at p 15);

(F) 'I became even more suspicious of the manner in which UHB's affairs were being conducted. I wrote a letter dated 31 May 2007 to (the plaintiff) asking for information regarding the disposal of the 7.52m shares.' (WSDW1, Q&A 34, at p 16). The defendant further stated 'There has been no response to date.' (WSDW1, Q&A 35, at p 16). The defendant insisted that he did not receive any information despite the fact that he was informed during a meeting on 12 July 2007 (bundle D1, at pp 202 and 208) where it was recorded - (The defendant) informed the meeting that in the last Board meeting, he was attacked by several directors and as a consequence (sic) thereof, he had written a letter to the Chairman to seek clarification on disposal of shares in [UDPB]. In reply, (the plaintiff) informed (The defendant) he was away and received the letter on the 28 June 2007. In view of the letter was carbon copied to all the directors, he intended to answer his question in the forthcoming board meeting. Nevertheless, (The defendant) noted that the minutes of the Special Committee had answered his question and the detail of the disposal was given to him.; and

(G) l thought it was extremely hypocritical and deeply irresponsible for Tan Sri Ngan to make that statement, given the history of ACCCIM and UHB. I spoke out strongly against the Mandate. The 6 Directors (including the plaintiff) were very hostile towards me. I was the sole voice of dissent at the meeting. The recommendation was passed without my support. I was out-voted, which, given what I knew, I did not find surprising at all. (WSDW1.Q&A 38, at p 17).

The defendant's insinuation was made notwithstanding the fact that the issues were raised in the ACCCIM Suit and the learned trial judge, Dato' Lim Yee Lan JCA (sitting as a HC Judge) had rejected ACCCUVTs claim by delivering orally a reserved judgment on 25 May 2012. The defendant agreed that he was present in open Court when the judgment in the ACCCIM Suit was delivered orally and despite that, the defendant continued to make similar allegations against the plaintiff when he testified on 26 June 2012.

(2) the defendant insinuated that the plaintiff had abused Court process by using libel writ to 'gag' the defendant from speaking.

(e) the defendant was actuated by malice when he made the impugned statements.

(See *Gatley on Libel and Slander* (10th Ed), para 32.48 at p 984; *Tun Datuk Patinggi Haji Abdul-Rahman Ya'kub* at pp 4161– 417C approved by the Court of Appeal in *Bre Sdn Bhd* at p 493D).

[74] No exemplary damages were awarded as the defendant did not gain some advantage in making the impugned statements in favour of the defendant's committee and to oppose the proposed return of capital and capital reduction scheme in the manner which the plaintiff submits.

COSTS

[75] The defendant submits that:

(a) should the defendant succeed, RM300,000 would be the fair and reasonable quantum;

(b) should the plaintiff succeed:

(i) and his award of damages is above RM250,000, then RM150,000 would be the fair and reasonable quantum;

(ii) alternatively, if his award of damages is below RM250,000, then his costs should be based on the Subordinate Court scale in Order 59 rule 23.

[76] The plaintiff submits that:

(a) if the plaintiff is successful

(i) a sum of RM200,000 is fair and reasonable amount for getting up fees; and

(ii) the award of costs should carry interest at the rate of 5% per annum from the date of award of costs until full payment (O 59 r 24 of the RC);or

A (b) if the plaintiff is unsuccessful, the defendant should not be entitled to any costs.

B **[77]** The court fixed costs at RM100,000 after considering the factors in O 59 r 16(1) of the Rules of Court 2012:

(a) the action raises a difficult question of fact of whether the defendant made the impugned statements at the press conference on 25 September 2007 as the words published in the impugned publications were materially different from the defendant's version;

C

(b) for the getting-up of the action and during the trial, the plaintiff had to engage solicitors who were conversant in written and spoken Mandarin as (i) the impugned publications including the impugned statements; (ii) a substantial number of documents in the bundles were written in Mandarin; and (iii) the interviewing and the preparation of witness statements in Mandarin.

D

(c) the trial proceeded for five days with three witnesses each. There were altogether 14 bundles of documents ('BOD') comprising one CBOD ('B'), seven volumes of plaintiff's BOD ('C1–C7') and six volumes of defendant's BOD ('D1–D6'); Four written submissions which require time and labour to be expended by the counsel;

E

(d) the case is of great importance to the plaintiff: being a highly successful corporate figure with extensive involvement in various Chinese guilds and associations and formerly the President of ACCCIM to which the subject matter of the impugned statements are related, his complaint is his reputation suffered damage as a result of the publication of the impugned statements and he had to vindicate himself in court as the question of 'face' carries a very important meaning in the Chinese community;

F

G

(e) pursuant to O 59 r 8(b) of the ROC:

(i) the defendant's conduct before the plaintiff filed the proceedings (see para 8(a) to (g) above) and during the proceedings whereby the defendant abandoned the defence of justification only at submission stage as per his written submission dated 16 August 2012; and after the plaintiff had submitted on the said defence;

H

(ii) the defendant had sought to raise defences which were not pleaded: namely, (i) the *Oriental Daily News* article; defence of fair comment when the defendant failed to particularise which of the words complained of are statements of fact and which are expressions of opinion as required under O 78 r 3(2) of the RHC; and raising the *Reynolds* defence for the first time in submission.

I

CONCLUSION

[78] On a balance of probabilities the court finds the plaintiff has proven

(a) the defendant had made the impugned statements and had caused the publication of the impugned publications;

(b) the impugned statements were defamatory of the plaintiff;

(c) the defendant can avail himself of the defence of qualified privilege but this defence is defeated as the defendant was actuated by malice in making the impugned statements and by causing the impugned publications.

[79] The plaintiff has failed to prove the defence of fair comment, the *Reynolds* defence, defence of consent (acquiescence and estoppel) and abuse of process of court.

[80] In the circumstances the plaintiff is awarded:

(a) the sum of RM200,000 as general damages and aggravated damages;

(b) interest on the damages awarded at the rate of 4% from the date of filing of the writ of summons to the date of judgment and at the rate of 5%pa from the date of judgment to the date of full realisation;

(c) costs to the plaintiff to be paid by the defendant in the sum of RM100,000; and

(d) the award of costs shall carry interest of 5%pa from the date of the award of costs (21 December 2012) until full payment.

Order accordingly.

Reported by Kanesh Sundrum